

**Varusay Mohamed Shaik Abdul Rahman v SVK Patchee Bros (M) Sdn Bhd**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P 02-314 OF 2000

MOKHTAR SIDIN, MOHD NOOR AHMAD JJCA AND FAIZA TAMBY CHIK J

5 JULY 2002

*Companies and Corporations — Winding up — Just and equitable rule — Rival business set up by managing director and family members — Appellant kept out from participating in the management of the company after removal as permanent director and forced to retire — Whether there was serious mismanagement of the company in its administrative and financial affairs — Whether there existed evidence of breakdown of mutual confidence and good faith among the parties — Whether winding up on just and equitable ground justified*

This was an appeal against the dismissal of the appellant's winding up petition. In the petition the appellant prayed for the respondent ('the company') to be wound up, for the appointment of a liquidator for the purpose and for the proceeds of sale of the company's assets to be paid out to its shareholders as intended under a will or alternatively in such proportions corresponding to the shareholdings as may be determined by the court. The petition was based on s 218(1)(i) of the Companies Act 1965 ('the Act'), that is to say, on the just and equitable ground. Briefly, the alleged grievances were: (i) the share equity in the company had been altered to the prejudice of the appellant; (ii) there was serious mismanagement of the company in its administrative and financial affairs; (iii) a rival business was set up by the managing director of the company and his family members; and (iv) the appellant was kept out from participating in the management of the company after he was removed as its permanent director and was forced out as its director by reason of compulsory retirement at the age of 60. At first instance, the judge exercised his discretion not to grant the winding up order on the sole ground that since the company was 'a going concern' and capable of making profits, a winding up order would cause undue hardship to its workers.

**Held**, allowing the appeal:

- (1) On the facts of this case, the company was formed and continued on the basis of a personal relationship involving mutual confidence. By reason of the allegation (that a rival business was set up by the managing director of the company and his family business) as proved either taken as a whole or in part, it was manifestly clear that the parties no longer enjoyed the confidence of each other. This fact provided convincing evidence of the breakdown of mutual confidence and good faith among the parties to justify the winding up on the just and equitable ground. Since the learned judge did not at all direct his mind to the settled

- A** principles and the relevant facts of the case, it amounted to a non-direction (see p 681A–B, D).
- (2) The learned judge in exercising his discretion had manifestly proceeded on a wrong ground. On the authorities the fact that a company is an on going concern and capable of making profits has never been considered as a factor that falls within the ambit of the expression ‘just and equitable’. The same consideration goes for the fact of undue hardship to workers because practically all business enterprises must employ workers, whether many or few, who would in any event suffer undue hardship as the result of the winding up (see p 681E–F); *In re Yenidje Tobacco Company Limited* (1916) 2 Ch D 426 followed. On the facts, the fact of acquiescence could not override the fact that there was a breakdown of mutual confidence and good faith among the parties (see p 682D).
- B**
- C**

**D** [Bahasa Malaysia summary]

- Ini merupakan satu rayuan terhadap keputusan hakim yang arif di Pulau Pinang, yang menolak petisyen perayu. Dalam petisyen tersebut, perayu telah memohon supaya penentang (‘syarikat tersebut’) digulung, supaya seorang penyelesaian dilantik untuk tujuan ini dan supaya hasil jualan aset syarikat tersebut dibayar kepada pemegang saham sebagaimana dihasratkan di bawah suatu wasiat atau secara alternatif dalam bahagian sekadar dengan pegangan saham sepertimana diputuskan oleh mahkamah. Petyisen tersebut telah bersandar atas s 218(1)(i) Akta Syarikat 1965 (‘Akta tersebut’), yakni, sekiranya mahkamah berpandangan bahawa ianya adil dan saksama bahawa syarikat tersebut digulung. Secara ringkas, aduan-aduan yang dikatakan adalah: (i) ekuiti saham dalam syarikat tersebut telah ditukar hingga menjejaskan kepentingan perayu; (ii) telah berlakunya salah pengurusan syarikat tersebut dalam urusan pentadbiran dan kewangannya; (iii) suatu perniagaan saingan telah ditubuhkan oleh pengarah urusan syarikat tersebut bersama ahli-ahli keluarganya; dan (iv) perayu tidak dibenarkan menyertai pengurusan syarikat tersebut setelah diberhentikan sebagai pengarah tetap dan dipaksa berhenti sebagai seorang pengarah disebabkan persaraan wajib apabila mencapai umur 60 tahun.
- E**
- F**
- G**

**H** **Diputuskan**, membenarkan rayuan tersebut:

- (1) Atas fakta-fakta kes ini, terutamanya di mana perkongsian yang wujud sebelum ini ditukar kepada sebuah syarikat berhad dan diuruskan sebagai perniagaan keluarga, syarikat tersebut telah ditubuhkan dan berterusan atas dasar hubungan peribadi yang melibatkan saling keyakinan. Disebabkan tohmahan seperti yang dibuktikan sama ada diambil kira pada keseluruhan atau sebahagian daripadanya, adalah amat jelas bahawa pihak-pihak
- I**

tidak lagi yakin sesama mereka sendiri. Hakikat ini memberikan keterangan yang meyakinkan ke atas keretakan saling berkeyakinan dan niat baik antara pihak-pihak terbabit untuk menjustifikasikan penggulangan atas alasan adil dan saksama. Oleh kerana hakim yang arif langsung tidak mengarahkan perhatian kepada prinsip-prinsip mantap dan fakta relevan kes, ia adalah sama seperti ketidakarahan (lihat ms 681A–B, D).

- (2) Hakim yang arif dalam melaksanakan budi bicara beliau jelas telah berbuat demikian atas alasan yang salah. Berdasarkan nas-nas yang diputuskan hakikat bahawa sebuah syarikat merupakan suatu perniagaan yang sentiasa diberi perhatian dan berupaya mengaut keuntungan tidak pernah diambilkira sebagai suatu faktor yang dirangkumi ungkapan 'just and equitable'. Pertimbangan yang sama hendaklah diberikan terhadap hakikat kesukaran yang tidak sewajarnya kepada para pekerja kerana hampir semua perusahaan perniagaan mesti menggaji pekerja, tidak kira ramai atau tidak, yang akan menanggung kesukaran yang tidak sewajarnya dalam apa keadaan pun akibat penggulangan itu (lihat ms 681E–F); *In re Yenidje Tobacco Company Limited* (1916) 2 Ch D 426 diikuti. Berdasarkan fakta-fakta, hakikat penerimaan secara diam-diam tidak boleh mengatasi hakikat bahawa, telah berlakunya keretakan saling berkeyakinan dan niat baik di antara pihak-pihak tersebut (lihat ms 682D).]

### Notes

For cases on just and equitable rule, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 888–915.

### Cases referred to

*Evans v Bartlam* (1937) AC 473 (refd)  
*New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading* [1992] 1 MLJ 185 (refd)  
*Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 (refd)  
*Westbourne Galleries, In re* [1973] AC 360 (refd)  
*Yenidje Tobacco Company Limited, In re* (1916) Ch D 426 (refd)

### Legislation referred to

Companies Act 1948 [Eng] ss 218, 222(f)

**Appeal from:** Companies Winding Up No 28–41 of 1999 (High Court, Pulau Pinang)

*Kiley Tan Ban Teong (Harmander Kaur with him) (Shearn Delamore & Co)* for the appellants.

*Surinder Singh (Ong & Manecksha)* for the respondent.

**A Mohd Noor Ahmad JCA (delivering judgment of the court):** This is an appeal against the decision of the learned judge at Pulau Pinang which dismissed the appellant's petition. In the petition, the appellant prayed for the respondent ('the company') to be wound up, for the appointment of a liquidator for the purpose and for the proceeds of sale of the company's assets to be paid out to its shareholders as intended under a will or

**B** alternatively in such proportions corresponding to the shareholdings as may be determined by the court. The petition was pitched on s 218(1)(i) of the Companies Act 1965 ('the Act'), that is to say, if the court is of the opinion that it is just and equitable that the company be wound up. Briefly, the alleged grievances are:

- C** (i) the share equity in the company had been altered to the prejudice of the appellant;
- (ii) there was serious mismanagement of the company in its administrative and financial affairs;
- (iii) a rival business was set up by the managing director of the company and his family members; and
- D** (iv) the appellant was kept out from participating in the management of the company after he was removed as its permanent director and was forced out as its director by reason of compulsory retirement at the age of 60.

**E** The facts of the case are clearly set out in the learned judge's judgment. For ease of reference, they are produced hereunder:

SVK Patchee Brothers (Malaysia) Sdn Bhd was incorporated on 3 July 1967 under the Companies Act, 1965 as a private company limited by shares and its registered office is at No 15 Lebuhraya, 10200 Penang. It has an authorised share capital of RM1.5m made up of 1,500,000 shares of RM1 each. The shareholders are the descendants of Vershay Mohamed Manium who first registered the said company in 1837 as a business entity under the name of SVK Patchee Brothers (Manium). Vershay as far as it could be ascertained from the record of proceeding had a son named Shayana Vana Shayana Manium. The said Shayana, by a will dated 27 April 1932 bequeathed the said business to his sons, namely Sayana Abdul Rahman (the petitioner's father) and Sayana Mohamed Ismail. The will reads in parts:

**F** 'I bequeath all my business of Dubash and Stevedor which now carry on at No 15 Bishop Street, Penang under the name of SVK Patchee (Manium) Brothers together with the goodwill thereof and all goods and stock in trade and the sum of dollars one thousand (\$1,000) deposited by me with Pstayakerr and company in connection with or used for purpose

**G** of the said business into my trustees upon trust to carry on the business for a period of 21 years after my death unless special circumstances arise which in their opinion make it expedient to sell the same in which case, I declare that the proceeds of such sale shall be divided equally between my said sons Sayana Abdul Rahman and Sayana Mohamed Ismail.

**H**

**I** I declare that only one of my said sons shall take charge of my said business during a period of one year while the other said son shall take charge the following year in rotation. I further declare that the profits derived from the said business shall be divided equally between my two

sons Sayana Abdul Rahman and Sayana Mohamed Ismail subject to the allowances for the maintenance of my two wives as follows:

**A**

- (1) ...
- (2) ...
- (3) ...

All the rest and residue of my estate of whatever nature and wherever situate I give and bequeath to my sons Sayana Abdul Rahman and Sayana Mohamed Ismail to be divided between them equally subject to the payment of my debt, funeral and testamentary expenses.'

**B**

Currently, the registered shareholders of the company as at 14 November 1997 are the petitioner and his two brothers and Shaik Allaudin and his brothers, sisters and his siblings. It is provided by art 75 of Memorandum and Article of Association of the company that Messrs Haji S Mohamed Ismail JP, SMI, Shaik Allaudin and SA Varusay Mohamed, (the petitioner) shall be permanent directors of the company. The Managing Director of the company is Shaik Allaudin and the other directors are his son Shaik Aqmal and his brother Shaik Sulaiman.

**C**

The patriarch and founder of the company died in India in 1938 while his son Sayana Abdul Rahman died in India on 28 May 1947 and the other son Sayana Mohamed Ismail died in Penang 1969. This dispute is among and between the grandsons of the patriarch.

**D**

After the death of Shayana Vana Shayana Manium, SVK Patchee Brothers (Manium) was entrusted under the will to the two brothers — Sayana Abdul Rahman and Sayana Mohamed Ismail who carried out the business under the terms of the said will until its incorporation on 3 July 1967. It was essentially a partnership business between the two brothers. When the company was incorporated on 3 July 1967 the shareholders were:

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|                       |                                 |
|-----------------------|---------------------------------|
| Sayana Mohamed Ismail | — ten shares                    |
| Shaik Ibrahim         | — six shares                    |
| Varusay Abdul Rahman  | — six shares                    |
| and his two brothers  | — four shares (two shares each) |

**F****G**

The directors were:

Sayana Mohamed Ismail, Shaik Ibrahim, Shaik Allaudin and Varusay Abdul Rahman.

**H**

The company was involved in the business of stevedoring, shiphandling and mutton trading and later on it diversified in the trading of cement and granite.

The facts have been reviewed by us and we are in agreement.

The learned judge made the following findings on the alleged grievances.

**I**

On grievance (i), the shares of Sayana Abdul Rahman and Sayana Mohamed Ismail in the company was not at all times in equal shares, simply

- A** because each of the two sons did not take charge of the company each year by rotation as stipulated in the will nor was the company sold. The company was managed by Sayana Mohamed Ismail from the time when Sayana Abdul Rahman returned to India. Therefore, it was not improper for Sayana Mohamed Ismail to allot ten shares to himself, six shares to his son Shaik Ibrahim and ten shares to the three sons of Sayana Abdul Rahman.
- B** The ratio reflected the share distribution of the partnership in 1958 namely, six and a half shares out of ten shares went to Sayana Mohamed Ismail and his 2 children. However, based on the existing share equity in the company as on 18 March 1998 (per exh B at pp 74–80 of the appeal record) the learned judge ruled that the shares of the appellant and his brothers had
- C** been reduced to a disproportionate ratio with careless disregard to the spirit and intention of the will and that the appellant's and his brothers' shares should not be less than 35% of the shares of the company.

On grievance (ii), having scrutinized the various exhibits tendered the learned judge was satisfied and ruled that there was mismanagement of the administrative and financial affairs of the company.

- D** On grievance (iii), the learned judge did not make any finding or ruling on this.

- On grievance (iv), the learned judge concluded that the removal of the appellant from being the permanent director of the company was to remove an obstacle and was not bona fide as it was done under the guise of the compulsory retirement age of 60 which resulted in the appellant's right to participate in the affairs of the company taken away and denied and ruled that such removal was not bona fide, improper and inequitable.
- E**

We realize and fully appreciate that the learned judge made his decision based purely on his findings of fact. Therefore, it is our duty to scrutinize the decision with great care and caution. For it is only in rare cases that an appellate court should interfere with the primary findings of fact made by the trial court, that is to say, where the decisions are plainly wrong or unjust. Having so scrutinized we decline to interfere with the learned judge's findings and conclusions on those grievances. However, as there was a non-direction on grievance (iii), we take upon ourselves the task of considering whether or not on the evidence before us, the allegation has been established. We are not in any less disadvantageous position as the learned judge to decide on this issue. The allegation on the rival business is contained in para 23 of the petition and the denial which is a bare denial is contained para 11 of the affidavit in opposition. Nothing much rests on credibility as the learned judge did not make any note in the notes of proceeding to enable credibility to be assessed. In fact, when questioned by the Court SD 2, the managing director of the company admitted that he was a director of the rival business (Kasifa Holding Sdn Bhd) which traded in granite which is similar item as traded by the company and shared the same business address as the company (see p 162D of the appeal record).

- H**
- I** On these facts, we are satisfied that the allegation has been proved.

The learned judge despite having so found on the allegations exercised his discretion not to grant the winding up order on the sole ground that

since the company is 'a going concern' and is capable of making profits, a winding up order would cause undue hardship to its workers. It is settled law that an appeal will not be entertained from an order which it was within the discretion of the judge to make unless it be shown that he exercised his discretion under a mistake of law (see *Evans v Bartlam* (1937) AC 473) or where discretion is given to a judge the appellate court ought not to review his decision unless he has declined to exercise his discretion or has manifestly proceeded on a wrong ground (see *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185 at p 200E).

The principles enunciated in *In re Westbourne Galleries* [1973] AC 360 at p 379 apply in Malaysia to a petition under s 218 of the Act for a winding up on just and equitable grounds (see the Privy Council case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 at p 434). Our s 218(1)(i) is in pari materia with the provisions of s 222(f) of the English Companies Act 1948. In that case on 'just and equitable' Lord Wilberforce said:

My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these consideration may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable consideration requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

A It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves.

B On the facts of this case, especially where the pre-existing partnership had been converted into a limited company and run as a family business, it is our considered view that the company was formed and continued on the basis of a personal relationship involving mutual confidence. By reason of the allegation as proved either taken as a whole or in part, in particular grievances (i), (ii) and (iv), it is manifestly clear that the parties no longer enjoyed the confidence of each other. This fact provided convincing evidence of the breakdown of mutual confidence and good faith among the parties to justify the winding up on the just and equitable ground. We are fortified in our view by what was deposed by SD 2 who is the head of the other faction when questioned by the court. He said:

D Varusay (*the appellant*) is our cousin brother, his relationship is not good with me and my whole family. We are not on speaking terms since 1992. It's family problem, we can't work together (see p 162A of the appeal record). (Emphasis added.)

That statement sealed the fate of the company.

E We are of the view that since the learned judge did not at all direct his mind to the settled principles and the relevant facts of the case, in particular the statement of SD2, it tantamounts to a non-direction. And further, the learned judge in exercising his discretion has manifestly proceeded on a wrong ground, because on decided authorities the fact that the company is an on-going concern and is capable of making profits has never been considered as a factor that falls within the ambit of the expression 'just and equitable'. The same consideration goes for the fact of undue hardship to workers because practically all business enterprises must employ workers, whether many or few, who will in any event suffer undue hardship as the result of the winding up. In *In re Yenidje Tobacco Company Limited* (1916) 2 Ch D 426, the company was wound up in spite of it continuing to transact business and large profits were made. And in *In re Westbourne Galleries*, the company though made good profits all of which were distributed as directors' remunerations nevertheless was wound up.

G As the learned judge had erred in law in the exercise of his discretion, we are entitled to review and interfere with his decision.

H There are two points which the learned judge did not direct his mind though raised by both counsels in their submissions. The first point in whether there had been a break in the business of the SVK Patchee Brothers. The second point is whether the appellant had acquiesced to the decisions of the company relating to the complaints he raised. On the former, the appellant contended that there is no break in the business of SVK Patchee Brothers whilst the company asserted that there was a break in the business at the time of the incorporation of the company because at the meeting of 16 September 1967, it was agreed that the estates of SVS Manium and Abdul Rahman ceased to have any interest or any share in the company. With regard to the latter, the company claimed that prior to his

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retirement the appellant was involved in the management of the company and he was present at the meetings and consented to the impugned resolutions/decisions made thereat. On the first point, we are of the view that there is no break of the business. Although there were subsequent partnership agreements and dissolution of the partnership essentially the business was continued, otherwise it would have ended upon the death of Manium if not for the Will. This is manifest from the fact that: (i) the company is still using the name of business in 1947; (ii) from the documents tendered the company has its roots from 1937; (iii) the shareholders and the directors of the company since incorporation are the direct descendants of Manium; and (iv) SD 2, when cross-examined, admitted that the business was not sold but continued until this day (see p 160 para B of the appeal record). On the second point, although the claim may hold water we do really appreciate the situation that the appellant was placed in and his predicament, that is to say, after the death of his father he was raised by the late father of SD 2 to whom he owed respect and obedience according to tradition, and he was always been the voice of dissent which was extinguished, covered up by the majority and out voted. Be that as it may, it our view that the fact of acquiescence cannot override the fact that presently there is a breakdown of mutual confidence and good faith among the parties.

At end of the judgment the learned judge concluded:

At the hearing there was no submission on alternative orders and my attention was not invited to the alternative prayer in the petition, otherwise I would in addition to making an order disallowing a winding up of the company, order the reinstatement of the petitioner as a permanent director and increase his shares together with his brothers to 35% shares of the company.

We wish to point out that there are no provisions in the Act which requires the court to consider the availability of alternative remedies and it was not obligatory for the court to consider the availability of alternative remedies before making a winding up order under s 218(1)(i) of the Act (see the Supreme Court case on *Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769. That may be the reason as to why the learned counsel for the appellant did not submit on or did not invite the learned judge's attention to that point.

Therefore, we allow the appeal and the following orders are hereby made:

- (i) the company be wound up and that an approved liquidator nominated by the appellant be appointed liquidator of the company;
- (ii) the proceeds of sale of the assets of the company be held by liquidator and the net proceeds be paid out to the shareholders of the company in the proportion of 65% to the descendants of Sayana Mohamed Ismail in accordance with respective shareholdings and 35% to the descendants of Sayana Abdul Rahman according to their respective shareholdings in the company;
- (iii) Costs here and below to appellant to be taxed; and

**A** (iv) deposits to be refunded.

My learned brothers Mokhtar Sidin JCA and Faiza Tamby Chik J have read this judgment in draft and have expressed their agreement with it.

*Appeal allowed.*

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Reported by Peter Ling

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